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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91212477
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In re Application Serial No. 85/751,520
Published for Opposition on March 19, 2013
Trademark: EARTH BALANCE

BALANCE BAR COMPANY,

Opposer,

v.

GFA BRANDS, INC.,

Applicant.

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Opposition No. 91212477

OPPOSER'S EIGHTH NOTICE OF RELIANCE

Pursuant to Rule 2.122(e) of the Trademark Rules of Practice, Opposer, Balance Bar Company, hereby submits, makes of record in connection with this opposition proceeding, and notifies Applicant of its reliance upon the attached article entitled "Likelihood of Confusion Studies and the Straited Scope of Squirt" authored by Jerre B. Swan and published in the May-June 2008 edition of The Trademark Reporter (Vol. 98, No. 3).

This article is relevant to this proceeding because, among other things, it is cited in Opposer's Rebuttal Export Report. A true and correct copy of the mentioned article is attached hereto as Exhibit H.

Respectfully submitted,

BALANCE BAR COMPANY

Dated: 3 December 2014

By: R. M. M.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing OPPOSER'S EIGHTH NOTICE OF RELIANCE has been served via first-class mail and email this 3rd day of December, 2014 upon the following:

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EXHIBIT H

The Trademark Reporter®

The Law Journal of the International Trademark Association



Likelihood of Confusion Studies and the
Straitened Scope of Squirt

By Jerre B. Swann

Initial Interest Confusion Versus
Consumer Sovereignty:
A Consumer Protection Perspective
on Trademark Infringement

By Ross D. Petty

Taking Unfair Advantage or
Diluting a Famous Mark —
A 20/20 Perspective on the Blurred Differences
Between U.S. and E.U. Dilution Law

By Marcus H. H. Luepke

Combining Trademarks in a
Jointly Owned IP Holding Company
By Lanning Bryer and Matthew Asbell

Virtual Trademark Use —
The Parallel World of Keyword Ads

By Jonathan Moskin

The Trademark Reporter®

LIKELIHOOD OF CONFUSION STUDIES AND THE STRAITENED SCOPE OF SQUIRT*

By *Jerre B. Swann* **

I. INTRODUCTION

The plurality of consumer surveys conducted under the Lanham Act address likelihood of confusion issues.¹ The predominant formats, from the onset, have been Eveready and Squirt. The formats are alike in their need for control cells. The formats differ, however, often dramatically, in (a) their design; (b) the means by which they access brands and facilitate inferences as to source; (c) the confusion factors they measure; and (d) the circumstances under which they appropriately may provide evidence supporting (or negating) a conclusion as to the likelihood of confusion. An in-depth and interdisciplinary understanding of each format is critical to the litigation of trademark disputes.

In 1976, in *Union Carbide*,² the Seventh Circuit endorsed the Eveready format in litigation involving the EVEREADY mark for batteries. Over time, this format has become the gold standard³ in cases involving strong marks,⁴ *i.e.*, in cases where the senior mark is highly accessible (*internally available*) in memory, enhancing the likelihood that it will be cognitively cued by a junior user's mark.

* This article represents an interdisciplinary exploration and expansion of the "Likelihood of Confusion" section of the "Surveys in Trademark Cases in the United States" chapter that I authored for R. M. Corbin and A. K. Gill (eds.), *Survey Evidence and the Law Worldwide* (2008).

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1. See the bibliography, "Lanham Act Surveys by Issue," in Gerald L. Ford's "Lanham Act Surveys Annual Cumulative Update 2007," available in the members-only section of INTA's website, inta.org, or at fordbubala.com.

2. *Union Carbide Corp. v. Ever-Ready, Inc.*, 531 F.2d 366, 385-88 (7th Cir. 1976).

3. See, e.g., 5 J. Thomas McCarthy, *Trademarks and Unfair Competition* § 32:175 (4th ed. 2007) [hereinafter *McCarthy*].

4. The line between strong and weak marks is neither bright nor constant. I have, in past years, used a Squirt format in connection with marks that I now test with an Eveready format, and the accessibility of a brand in memory occasionally can only be determined by a pilot study.

In 1980, in *Squirtco*,⁵ the Eighth Circuit held that results from a Squirt study supported a lower court finding as to the “possibility of confusion” between SQUIRT and QUIRST for non-cola soft drinks. Over time, the Squirt format has come to be used in cases where the accessibility of the senior mark in consumers’ memory is low to non-existent, so that it must be made *externally available* to respondents as part of the survey design. Because a Squirt test uses closed-ended questions, it has been historically criticized by pundits and the courts.⁶

The analysis below confirms, as to strong marks, the gold standard status of Eveready. As to Squirt, it suggests that the use of closed-ended questions should not be the issue. Rather, the latter format should be sanctioned where it is limited to the conditions of its origin (directly competing or substantially overlapping goods), *i.e.*, where the stimuli proximately tested in the format appear, in fact, proximately in the marketplace. Where brand strength is uncertain, or in a Circuit that stresses the similarity of marks as a confusion factor,⁷ a surveyor may consider “going both ways”⁸—an as yet judicially untested, but intellectually intriguing alternative.

II. EVEREADY

A. The Questionnaire

In a standard Eveready format, a respondent is first shown an exemplar,⁹ photograph¹⁰ or advertisement of defendant’s branded

5. *Squirtco v. Seven-Up Co.*, 628 F.2d 1086, 1089 n.4, 1091 (8th Cir. 1980).

6. See, e.g., R. Bradlee Boal, *Techniques for Ascertaining Likelihood of Confusion and the Meaning of Advertising Communications*, 73 TMR 405, 422 (1983), noting that the Squirt same-company/different-company question is not neutral, but “strongly suggests a possibility that might not have occurred to the interviewees—the products are made by the same company.” See also Shari S. Diamond, *Reference Guide on Survey Research*, Reference Manual on Scientific Evidence 251 (2000) (hereinafter Diamond, *Guide*) (“Closed-ended questions . . . may remind respondents of options that they would not otherwise consider or which simply do not come to mind as easily.”); Richard J. Leighton, *Using Daubert-Kumho Gatekeeping to Admit and Exclude Surveys in Lanham Act Advertising and Trademark Cases*, 92 TMR 743, 781 (2002) (closed-ended questions “often indicate to respondents areas of interest to the surveyor”). “[T]he mere putting of [the] question creates the impression of a relationship.” *Kargo Global, Inc. v. Advance Magazine Publishers, Inc.*, 2007 U.S. Dist. LEXIS 57320 *26 (S.D.N.Y. 2007).

7. See *A & H Sportswear, Inc. v. Victoria’s Secret Stores, Inc.*, 237 F.3d 198, 216 (3d Cir. 2000).

8. Dr. Alex Simonson, *Surveys of Trademark Confusion: Basic Differences*, 5 Intell. Prop. Strategist 1, 2 (November, 1998). As appears *infra*, mark similarity is “isolated” by such an approach.

9. Context can convey information that consumers use in making source determinations. With point of purchase surveys, therefore, “the closer the survey context comes to marketplace conditions, the greater the evidentiary weight it has,” 5 *McCarthy*,

(or “trade dressed”) product and, after the stimulus is removed from view or while it is still present,¹¹ is asked the open-ended question, “Who makes or puts [this] out?”¹² followed by, “Why do you say that?”¹³ Questions as to other relationships referenced by the Lanham Act, often in closed-ended form, typically follow.¹⁴

supra note 3, § 32:163, which often requires displaying actual products, packaging and other source indicia that consumers would encounter at the point of sale.

10. With post-sale confusion, context (adjacent competitive products, signage, etc.) is irrelevant and would give the respondent information not typically available in a post-sale encounter. See *Gateway, Inc. v. Companion Prods., Inc.*, 68 U.S.P.Q.2d 1407, 1420 (D.S.D. 2007) (“Post-sale confusion is particularly relevant in this case because . . . [a]fter Cody Cow is purchased, the point of sale materials are removed by the purchaser, and [have] no ‘confusion obviating effect’”). Accordingly, photographs or videos that fairly reproduce what a respondent would see post sale may be easier to control (and afford greater certainty as to what respondents see) than actual displays that a field service may fail faithfully to execute in a shopping center interviewing booth. See *Hermès Int’l v. Lederer de Paris Fifth Ave. Inc.*, 50 F. Supp. 2d 212, 222 (S.D.N.Y. 1999) approving a post sale stimulus showing a “Kelly bag (as carried by a woman walking at a distance of four feet).”

11. See Jerre B. Swann, *A “Reading” Test or a “Memory” Test: Which Survey Methodology Is Correct?*, 95 TMR 876 (2005) and Mike Rapoport, *Response to Survey Methodology Articles*, 96 TMR 769 (2006), advocating that, in most circumstances, the stimulus be left with the respondent. See Henry D. Ostberg, *Response to an Article Entitled, “A ‘Reading’ Test or a ‘Memory’ Test: Which Survey Methodology Is Correct?”*, 95 TMR 1446 (2005), advocating the obverse. *Compare* *Cumberland Packaging Corp. v. Monsanto Co.*, 32 F. Supp. 2d 561, 578 (E.D.N.Y. 1999) (holding that “[i]n an actual market situation, the product would not disappear from the consumers eye just as he or she is about to make a purchase” and that removing the stimulus before asking the questions may lead to guessing) *with* *Am. Home Prods. Corp. v. Procter & Gamble Co.*, 871 F. Supp. 739, 748 (D.N.J. 1994) (holding that “consumers do not normally mediate over . . . details for any appreciable . . . time” and that leaving the stimulus with the respondent may result in repeated reinterpretation (or playback) of the contents of the stimulus).

12. Open-ended questions “require the respondent to . . . express an answer in his or her own words [and] give the respondent fewer hints about the answer that is expected or preferred.” Diamond, *Guide* at 251-52. I have seen critiques, however, that: (a) the Eveready question has demand effects; and (b) the “puts out” phraseology used in the original questionnaire lacks modernity and clarity. As for (a), the question might be introduced by the clause, “if you have any thoughts on this,” but I prefer to tease out demand effects with control cell methodology; as for (b), I believe the question as phrased in the text intelligibly inquires “what message as to source do you perceive to be communicated by the stimulus,” and that is the critical inquiry in strong mark likelihood of confusion cases.

13. With the advent of experimental designs, and the acknowledged difficulty that consumers can have in expressing “higher order processes,” Richard E. Nisbett and Timothy DeCamp Wilson, *Telling More than We Can Know: Verbal Reports on Mental Processes*, 84 *Psychological Rev.* 231 (1977), Dr. Shari Diamond is of the opinion (and I concur) that “why” questions may no longer be necessary. Because courts, however, often like to play with the “clarifying” information that “why” questions produce, *Cumberland Corp. v. Monsanto.*, 32 F. Supp. 2d at 572-73, 576; because some courts reject studies without “why” questions, *The Pep Boys Manny, Moe & Jack of Cal. v. Goodyear Tire & Rubber Co.*, 2002 U.S. Dist. LEXIS 5925 *30-33 (E.D. Pa. 2002); and because information developed from “why” questions may be helpful to counsel in analyzing the case or supporting the efficacy of the control stimulus, I will continue to insist on their inclusion in studies I commission.

14. See, e.g., *Starbucks U.S. Brands, LLC v. Marshall S. Ruben*, 2006 T.T.A.B. LEXIS 54 *35-37 (T.T.A.B. 2006).

Do you believe that whoever makes or puts this out: ONE, is sponsored or approved by another company; TWO, is not sponsored or approved by any other company;¹⁵ or

THREE, you don't know or have no opinion?¹⁶

[If ONE] What other company? [and] Why do you say that?

and/or

Do you believe that whoever makes or puts this out: ONE, has a business affiliation or connection with another company; TWO, does not have a business affiliation or connection with any other company; or THREE, you don't know or have no opinion?

[If ONE] With what other company? [and] Why do you say that?¹⁷

Where, as in *Union Carbide*, the owner of the senior mark is substantially anonymous and the defendant's goods are in a different category, the respondent is also asked, "Please name any other products put out by the same company that puts [this] out."¹⁸

B. Categorization and Pattern Matching in an Eveready Format

To appreciate fully the benefits of an Eveready approach, it is first necessary to understand current conditions of clutter. Half a century ago, Ralph S. Brown, Jr. wrote that there was a "babel of

15. In a precursor to *Union Carbide*, sponsorship issues were predominant. *James Burrough Ltd. v. Sign of Beefeater, Inc.*, 549 F.2d 266, 278 (7th Cir. 1976) ("Who do you believe is sponsoring or promoting this restaurant?").

16. "[P]resentation of an explicit 'don't know' or 'no opinion' alternative commonly leads to a 20%-25% increase in the proportion selecting that response." Diamond, *Guide* at 250. The benefits of "don't know" alternatives are debated in Michael Rapoport, *Litigation Surveys—Social "Science" as Evidence*, 92 TMR 957 (2002) and Jacob Jacoby, *A Critique of Rapoport's "Litigation Surveys—Social 'Science' as Evidence"*, 92 TMR 1480 (2002) (hereinafter *Litigation Surveys*). I concur with Dr. Jacoby that "don't know" alternatives are appropriate, as do a number of courts. *See, e.g.*, *Cumberland Corp. v. Monsanto*, 32 F. Supp. 2d at 572; *Procter & Gamble Pharms., Inc. v. Hoffmann-La Roche Inc.*, 2006 WL 2588002 *22-25 (S.D.N.Y. 2006). Choices in closed-ended questions *must* "cover all possible answers a respondent might give to the question [including "don't know"]. If the list . . . is incomplete, a respondent may be forced to choose one that does not express his or her opinion." Diamond, *Guide* at 253, citing *Am. Home Prods. Corp. v. Johnson & Johnson*, 654 F. Supp. 568, 581 (S.D.N.Y. 1987).

17. The follow-on questions rarely add more than a few points to the percentage of respondents reported as confused.

18. *Union Carbide Corp. v. Ever-Ready, Inc.*, 531 F.2d 365, 385 n.11 (7th Cir. 1976). Only .6% of respondents identified Union Carbide as the maker of defendant's EVER-READY lamp; 54.6 percent answered, however, that the same company that put out EVER-READY lamps also put out batteries, leading the court properly to conclude that the survey not only supported a finding of likelihood of confusion, but was evidence of secondary meaning of EVEREADY as well. *Id.* at 381.

brands,”¹⁹ and the “number of choices has [since] grown dramatically. . . .”²⁰ Books are devoted, indeed, to the theme that there is, “Too Much Choice.”²¹ Consumers are exposed to vastly larger amounts of information than they can register in their consciousness.²² They, almost literally, are bombarded by brand stimuli and cannot “attend” to all that fall within the range of their senses.²³ Of necessity, they “are highly selective.”²⁴

Even when a stimulus registers on their consciousness, consumers “rarely . . . consider all [its] features”;²⁵ rather, given their attention constraints amid clutter, they use shortcuts to “label, identify, and classify” the information.²⁶ If, for example, they see a small creature with the salient features of feathers and wings, they “categorize” it as a bird without stopping to test for every avian characteristic.²⁷

19. Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 Yale L.J. 1165, 1197 (1948).

20. AMA Marketing Management: Spring 2000.

21. Steven M. Cristol and Peter Sealey, *Simplicity Marketing* 7 (2000).

22. Jacob Jacoby, *The Psychological Foundations of Trademark Law: Secondary Meaning, Genericism, Fame, Confusion and Dilution*, 91 TMR 1013, 1022 (2001) (hereinafter, *Psychological Foundations*).

23. Wayne D. Hoyer and Deborah J. MacInnis, *Consumer Behavior* 115 (3d ed. 2004) (“Shoppers in a supermarket are exposed to numerous products, brands, ads, displays, signs, prices, logos, and packages all at the same time. We are generally unable to examine all those marketing stimuli simultaneously.”); Jacoby, *Psychological Foundations*, 91 TMR at 1034 (“the vast majority of stimuli fail to register upon consciousness”). See J. Paul Peter and Jerry C. Olson, *Consumer Behavior & Marketing Strategy* 119 (7th ed. 2005):

When many marketers are trying very hard to gain attention, consumers may tune out most of the stimuli. Consider the “miracle mile” strips of fast-food restaurants, gas stations, and discount stores, each with a large sign, that line highways in many American cities. Individually, each sign is large, bright, colorful, and vivid. Together, the signs are cluttered and none is particularly prominent. Consumers find it easy to ignore individual signs, and their attention (and comprehension) levels are likely to be low.

24. Philip Kotler and Kevin Lane Keller, *Marketing Management* 186 (12th ed. 2006) (“It has been estimated that the average person may be exposed to over 1,500 ads or brand communications a day. Because a person cannot possibly attend to all these, most stimuli will be screened out. . . .”). See *The Toro Co. v. ToroHead, Inc.*, 61 U.S.P.Q. 2d 1164, 1180 (T.T.A.B. 2001) (“Every day consumers are bombarded with hundreds, if not thousands, of advertisements for hundreds of products. . . . A great many of these ads do not make a significant impression on the public.”).

25. Jacoby, *Psychological Foundations*, 91 TMR at 1035, 1037.

26. Hoyer & MacInnis, *supra* note 23, at 115.

27. Jerre B. Swann and Michael J. Tarr, *Configuration Protection Harmonized*, 94 TMR 1182, 1192 (2004).

In memory,²⁸ strong brands function, in part, as antidotes to clutter. They exist as schemas—as “clusters”²⁹ of information (a) with source identifying (reputational) nodes at their center; (b) very strongly linked to the product(s) or service(s) in connection with which they are used; and (c) also linked to (usually a host of) other associations that have been engrafted on the schema by advertising, word of mouth or experience.³⁰ Cognitively, “a unique brand name and cohesive brand identity are probably the most powerful pieces of information for consumers . . . enabling [them] to efficiently organize, store, and retrieve information from memory.”³¹ Strong brands operate, moreover, much in the manner of a picture of a celebrity on the cover of a magazine in a sidewalk kiosk—they attract attention in an otherwise hurried environment.³²

The ADIDAS schema,³³ as an example, has the brand components (adidas, three stripes, etc.) and other indicia (shell toe, Superstar design, etc.) at its core, strongly linked to athletic shoes and wear, and also linked, in varying degrees, to a perception of high quality, soccer, sponsor of the Olympics, “cool” brand, Muhammad Ali, etc. When presented with a post-sale photograph of an athletic shoe having two or four parallel stripes on the side (of equal width and spacing) and with a shell toe, and when asked the question, “Who makes or puts [this] out,” respondents do not meticulously review each feature of the stimulus, but engage in “pattern matching” with respect to its more salient characteristics.³⁴ Respondents search their memory and identify the stimulus “based on its similarity to what [they] already

28. Very little information can be held (and attended to) in active consciousness, referred to as “cognitive workspace” or “consciousness of the moment”; most information is stored in memory where its accessibility ranges from the instantaneous to the “virtually unavailable.” Jacoby, *Psychological Foundations*, 91 TMR at 1015-16.

29. Jacoby, *Psychological Foundations*, 91 TMR at 1024-25; Jerre B. Swann, *An Interdisciplinary Approach to Brand Strength*, 96 TMR 943, 946 (2006) (hereinafter *Brand Strength*).

30. For a diagram of the Nike brand schema, see Peter & Olson, *supra* note 23, at 58-61 (noting at 74-81 that a brand is a “bundle” of functional and psychosocial attributes, benefits and “value satisfiers”). For a digestible discussion of the “associative network memory model,” see Kevin Lane Keller, *Strategic Brand Management* 46-50 (1998).

31. Jacoby, *Psychological Foundations*, 91 TMR at 1025; see Hoyer & MacInnis, *supra* note 23, at 183.

32. Peter & Olson, *supra* note 23, at 118-19.

33. For purposes of full disclosure, the author has appeared as counsel for Adidas A.G. in numerous cases.

34. Jacoby, *Psychological Foundations*, 91 TMR at 1035, 1037.

know”³⁵ and “[w]hen stimulus information offers a sufficient match to a schema possessed by the perceiver, the schema is called up from memory and used . . . to guide inferences.”³⁶ As to the stripe/shell toe example, 40 percent of test cell respondents typically draw the inference that the stimulus is ADIDAS.³⁷

C. The Confusion Factors Tested by Eveready

The Eveready format thus primarily addresses three confusion factors: similarity of marks and of products and brand strength. Strength is key (a) if a schema is easily accessible, it can be cued by a similar mark even where there is little or no similarity in products;³⁸ and (b) if a brand is dominant (COKE), it may be cued by another brand in the category (PEPSI), even where there is no similarity of marks.³⁹ If, however, the senior mark is not accessible, it obviously cannot be cued irrespective of mark and product similarity. “When an open-end question [is] used [in connection with] a mark that is not particularly well-known, it needs to be understood that the ‘top-of-mind’ awareness of the brand . . . required [by the Eveready format] may significantly underestimate [likelihood of] confusion.”⁴⁰

D. The Need for a Control Cell

Through the early 1990s, many survey experts opined that because of its open-ended format, an Eveready survey did not lend

35. Hoyer & MacInnis, *supra* note 23, at 102, 115-16 (3d ed. 2004) (“The cognitive networks in one’s memory . . . play a fundamental and often decisive role in interpreting incoming information from the outside world.”).

36. Donal E. Carlston and Eliot R. Smith, “Principles of Mental Representation,” in E. Tory Higgins and Arie W. Kruglanski (eds.), *Social Psychology: Handbook of Basic Principles* 196 (1998).

37. Expectation drives perception, Judith L. Zaichowsky, *The Psychology Behind Trademark Infringement* 74 (2006), and respondents may overwrite features of a stimulus to conform to memory (e.g., they may convert four stripes to three). Swann, *Brand Strength*, 96 TMR at 961-62.

38. An Eveready survey can thus measure the “reach” of a strong mark. “A mark that is strong . . . is more likely to be remembered and more likely to be associated in the public mind with [or triggered by] a greater breadth of products . . . , than is a mark that is weak because it is relatively unknown. . . .” *James Burrough Ltd. v. Sign of Beefeater*, 540 F.2d 266, 276 (7th Cir. 1976).

39. William G. Barber discusses this phenomenon in a dilution context in *How to Do a Trademark Dilution Survey (or Perhaps How Not to Do One)*, 89 TMR 616 (1999).

40. Phyllis J. Welter, *Trademark Surveys* § 24.03[1][c] (1999). Welter postulates that the Eveready format requires “unaided awareness” of the senior brand. In my view, however, the format more closely resembles a partially aided awareness test: it assesses whether the junior user’s mark and product cues are similar enough to those of the senior brand to trigger the latter’s schema as a response to a source articulated (as opposed to a mere recognition) question.

itself to guessing and did not require a control cell. In an effort to be helpful, however, some respondents will “guess” a leading brand in response either to a “Who makes or puts [this] out?”, or to a “What other brand or brands, if any, does [this] bring to mind?” question. Control cells are necessary, therefore, to filter out brand strength in both likelihood of confusion and dilution studies.⁴¹ I recall, indeed, one control cell in a dominant brand case that produced a noise level exceeding 25 percent.

E. The Scope of Eveready

In cases involving strong marks, the Eveready test should be considered the gold standard for fundamental cognitive and marketing reasons:

1. My experience has shown that an Eveready survey (a) used among prospective consumers (b) in face-to-face interviews and (c) with the stimulus left in view, engenders respondent “attention” approximating that of an “involved” consumer, and thus produces, coupled with a control cell to filter market share effects, a conservative (“reliable”) estimate of likelihood of confusion.⁴²

2. Reviews of “why do you say that” answers typically reveal that senior mark responses to the “Who makes or puts out” question have occurred because (a) “stored knowledge” of a senior mark is “accessible” in a respondent’s memory, and (b) there is a “*fit*” between the stored knowledge and the [junior] stimulus.”⁴³ Accordingly, a survey expert’s conclusion

41. See Jerre B. Swann, *Dilution Redefined for the Year 2002*, 92 TMR 585, 619-20 (2002). “Sharing in the goodwill of an article . . . is the exercise of a right possessed by all—and in the free exercise of which the consuming public is deeply interested.” Kellogg Co. v. National Biscuit Co., 305 U.S. 111, 122 (1938). The cuing of a dominant senior schema by a junior use only because the two are tightly linked to the same product category cannot thus give rise to actionable confusion or dilution. As between mark and product similarity, a finding of infringement must be supported by an appreciable degree of the former, and both a control cell and an analysis of “why do you say that” questions should tease out “same company” responses predicated on product similarity alone.

42. Jerre B. Swann, *Sophistication and the Sciences*, 97 TMR 1309 (2007). It is my view that net confusion calculations from an Eveready test of less than 10 percent should suffice to support a conclusion as to likelihood of confusion (and that, because of an elevated degree of noise discussed below, a level above 10 percent should be required from a Squirt format), but I cannot point to case law or cognitive literature supporting such a proposition. See 5 McCarthy, *supra* note 3, § 32:189, discussing a 10 percent threshold.

43. See E. Tory Higgins, “Knowledge Activation: Accessibility, Applicability, and Salience,” in Higgins & Kruglanski, *Handbook* 135 (1996); Michel Tuan Pham and Gita V. Johar, *Contingent Processes of Source Identification*, 24 J. of Consumer Research 249, 250 (1997) (“The probability of source identification through cued retrieval depends essentially on [a] the strength of the semantic link between the source and content that is formed at encoding, and [b] the overlap between the cues that are available at retrieval, and the to-be-recalled material. . . .”). With ADIDAS, *e.g.*, most respondents give “stripes” in answer to

as to a “likelihood of confusion,” based on an appreciable percentage of senior mark responses, has cognitively sound underpinnings.⁴⁴

3. Because a strong mark is likely to be attended to in the marketplace,⁴⁵ it is reasonable to assume that a stimulus that “fits” the strong mark’s schema will be attended to, and that an Eveready survey thus measures probable assessments in the marketplace, not artificially created or forced opportunities.

4. The only hypothetical is the degree to which a respondent would be likely to encounter the junior use in the marketplace, and any concern as to the real world basis for that likelihood is alleviated by limiting the universe to consumers and prospective consumers of goods in the category of the alleged infringer.⁴⁶

With respect to strong marks, therefore, the Eveready format is a relevant, reliable and objective test of likelihood of confusion.

I appreciate, of course, that a survey is, by analogy, an efficient proxy for calling witnesses to testify as to their perceptions, and that there may be no single survey for all strong mark likelihood of confusion cases, any more than there may exist a single line of examination, irrespective of the underlying facts, for “confusion” witnesses appearing in a courtroom.⁴⁷ The

a “why” question, reflecting their access to the three stripe mark and the “fit” or “overlap” with a two or four stripe stimulus.

44. See, e.g., Jacoby, *Psychological Foundations*, 91 TMR at 1028, 1034. Depending, of course, on the question asked, the cuing of a senior brand’s schema may only reflect association (likelihood of dilution), rather than identification (likelihood of confusion), and questions as to what a stimulus “brings to mind” have thus been appropriately rejected for likelihood of confusion purposes. *Holiday Inns, Inc. v. Holiday Out in Am.*, 481 F.2d 445, 447 (5th Cir. 1973). “Confusion and dilution [and fair competition] . . . exist on a continuum,” and a junior user’s position on the continuum is predominantly a function of (a) senior brand strength and of (b) brand and (c) product similarity. Jerre B. Swann, *Dilution Redefined for the Year 2002*, 92 TMR 585, 620-21 (2002).

45. See Swann, *Brand Strength*, 96 TMR at 955. “[F]amiliar brands are selectively given more exposure, attention, comprehension and retention by consumers,” Steve Hoeffler and Kevin Lane Keller, *The Marketing Advantages of Strong Brands*, 10 Brand Management 421, 424 (2003), and owners of strong brands thus get “dramatically more impact from the same communications budget.” David A. Aaker, *Managing Brand Equity* 186 (1992).

46. Such a universe definition is thus a “relevancy” requirement. See, e.g., Jacob Zimmerman v. Nat’l Ass’n of Realtors, 2004 T.T.A.B. LEXIS 180 (T.T.A.B. 2004). Likewise, where the junior user’s operations are geographically confined, the study should be confined to the area where there are respondents with the opportunity to come into contact with the junior mark. See, e.g., *James Burrough v. Beefeater*, 549 F.2d 266, 277 (7th Cir. 1976); Jacob Jacoby, “Survey and Field Experimental Evidence,” in Saul M. Kassin and Lawrence S. Wrightsman (eds.), *The Psychology of Evidence and Trial Procedure* 181 (1985).

47. Michael Rappeport, *Litigation Surveys—Social “Science” as Evidence*, 92 TMR 957, 961-62 (2002).

Eveready format, however, satisfies critical *Daubert*⁴⁸ criteria as interpreted in the 2000 Advisory Committee's notes to Federal Rule of Evidence 702: it is a "tested," not a subjective approach; it has been peer reviewed; with a control cell, it has a known error rate; and it has been generally accepted in the scientific community.⁴⁹

As to its acceptance, it may be that scientists have adopted the Eveready format because scientists know that Eveready has been adopted by the courts (*i.e.*, that they are driven by legal rather than scientific considerations⁵⁰), but it is not necessary here to resolve such chicken/egg conundrums. From my perspective, the Eveready format should be regarded as the "model" for testing likelihood of confusion as to marks with strong memory traces, and an expert who employs a different format should be prepared to defend the variant in questioning from a skeptical adversary and court.

III. SQUIRT

As befits the current conditions of marketplace clutter, almost two million marks are federally registered. Comparatively few have (or can hope to develop) sufficiently strong memory traces so as to be cued by pattern matching engendered by a monadic exposure to a similar junior use. The *internal search* of memory for a strong brand's schema that exists at the core of an Eveready study is thus hostile to the general run of marks.⁵¹ For weak marks, an Eveready format will consistently produce negligible estimates of likelihood of confusion. *Ergo* the Squirt format, with an *external review* of the marks at issue that flows from their side-by-side or sequential exposure inherent in the administration of a Squirt survey.

48. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

49. See Fed. R. Evid. 702 advisory committee's notes (2000).

50. Samuel J. Best and Benjamin Radcliff, *Polling America, An Encyclopedia of Public Opinion* 435 (2005) ("Innovative questioning techniques tend to be less common in legal surveys than in nonlitigation contexts because generally it is preferable to ask questions of the sort that have garnered court approval.").

51. An Eveready study should not thus be used to "disprove" confusion in a weak mark case, but courts frequently permit defendants to do so. See, e.g., *National Distillers Prods. Co., LLC v. Refreshment Brands, Inc.*, 198 F. Supp. 2d 474, 482-84 (S.D.N.Y. 2002), criticized for additional reasons below.

A. The Questionnaire

In *Squirtco*,⁵² survey respondents first heard radio ads for SQUIRT and QUIRST, and were then asked, “Do you think SQUIRT and QUIRST are put out by the same company or by different companies?” followed by, “What makes you think that?”⁵³ In a subsequently developed variant to remove the spotlight from the brands at issue, respondents are shown an array (or sorting board) of marks (including the senior and junior uses) and are asked,

Do you think that each of these brands is from a separate company, or do you think that two or more are from the same company or are affiliated or connected [in any way]?⁵⁴ If you don’t know, please feel free to say so.

[If TWO OR MORE FROM SAME COMPANY OR AFFILIATED/CONNECTED]

Which two or more brands do you believe are from the same company or are affiliated or connected? [and] Why do you say that?⁵⁵

Another variant, to address objections to a side-by-side display of products or brands that are not seen in such immediate physical proximity in the marketplace, is a “two room” study.⁵⁶ In the first room, the respondent sees a stimulus of the allegedly infringed product. In the second room, the respondent sees a “line-up”⁵⁷ of

52. *Squirtco v. Seven-Up Co.*, 628 F.2d 1086, 1089 n.4 (8th Cir. 1980). As an interesting side-note, SQUIRT was deemed a strong mark; in *Union Carbide*, the District Court (erroneously) found that EVEREADY was descriptive and did not merit protection. The use of Eveready for strong marks and Squirt for weak marks thus represents a role reversal wrought by subsequent history.

53. Like Eveready, a Squirt test may have follow-ons: e.g., “Do you think the first ad you just heard: (a) comes from a company that has a business connection with the company that put out the second ad you just heard; (b) comes from a company that does not have a business connection with the company that put out the second ad; or (c) you don’t know or have no opinion.” See *Kargo Global v. Advance Magazine*, 2007 U.S. Dist. LEXIS 57320 at *14.

54. See *Scott Fetzer Co. v. House of Vacuums Inc.*, 381 F.3d 477, 487-88 (5th Cir. 2004) criticizing the “in any way” phraseology as prodding “survey participants to search for any connection, no matter how attenuated . . . instead of permitting participants to make their own associations.”

55. In U.S. Trademark Trial and Appeal Board proceedings, where marks are tested as registered, often in block letter form, OMS Investments, Inc. v. Central Garden & Pet Co., 2006 T.T.A.B. LEXIS 274 *40-41 (T.T.A.B. 2006), an array as described (that includes both the allegedly infringed and infringing marks) theoretically should be probative. Testing an array under marketplace conditions is substantially more problematic, but not impossible—e.g., the brands may both coexist on grocery store shelves.

56. See *Storck USA v. Farley Candy Co.*, 797 F. Supp. 1399, 1408 (N.D. Ill. 1992).

57. For a discussion of the benefits of “line-ups,” see Rapoport, *Litigation Surveys*, 92 TMR at 986-87.

products in the same category, including the allegedly infringing product, and is asked whether any “come from the same maker or company as the product . . . I showed you [in the first room]?”⁵⁸

The two-room or line-up study, in McCarthy’s view, “is an attempt to replicate the marketplace process of advertising exposure to a brand or trade dress, followed by being confronted in the market with both similar and differing brands or trade dresses.”⁵⁹ Rather than on a side-by-side presentation of the junior and senior marks (or on their display one immediately after the other), it relies on a recent brand or stimulus display (on a “recency effect” in memory⁶⁰) to make the allegedly infringed brand accessible.

B. Categorization and the Representativeness Heuristic

As noted above, consumers do not meticulously examine brand stimuli; they categorize based on salient characteristics, and one mechanism they use in interpreting and classifying stimuli is the representativeness heuristic. A heuristic is a mental short-cut that consumers often take when making decisions, and according to the representativeness heuristic, consumers are likely to infer that things that are physically or conceptually similar or seem related must belong together.⁶¹ In *Beneficial Corp. v. Beneficial Capital Corp.*,⁶² the operation of the heuristic in a Squirt format was explained (in lay terms) as follows:

To the key question asked by the survey, “Do you think that there may or may not be a business connection between Beneficial Capital Corp. and the Beneficial Finance System Companies?” thirty-one percent of the respondents stated that such a connection was either definite or probable. . . . The

58. *Id.*

59. 5 *McCarthy*, *supra* note 3, § 32:177.

60. See Hoyer & MacInnis, *supra* note 23, at 185 (“[Y]ou are more likely to remember what you ate for breakfast this morning than what you ate a week ago because (1) this morning’s information has not yet decayed [been forgotten], and (2) there is much less information interfering with the retrieval of this information.”).

61. Daniel Kahneman and Amos Tversky, *Judgment under Uncertainty: Heuristics and Biases* 4 (1982) (“Many of the probabilistic questions with which people are concerned belong to one of the following types: What is the probability that object A belongs to class B? What is the probability that event A originates from process B? . . . In answering such questions, people typically rely on the representativeness heuristic, in which the probabilities are evaluated by the degree to which A resembles B. For example, when A is highly representative of B, the probability that A originates from B is judged to be high. On the other hand, if A is not similar to B, the probability that A originates from B is judged to be low.”).

62. 529 F. Supp. 445 (S.D.N.Y. 1982).

survey establishes . . . that the names are similar . . . and that portions of the general public will make the reasonable assumption that, in the absence of any other information, two companies with similar names [and products/services] are likely to have a business connection.⁶³

In *Wynn Oil Co. v. Thomas*,⁶⁴ the heuristic effectively was enshrined into law: “Cases where a defendant uses an identical mark on identical goods . . . are ‘open and shut’ and do not involve protracted litigation to determine liability for trademark infringement.”⁶⁵

C. The Confusion Factors Tested by Squirt

A Squirt format, and variants, test similarity of marks, similarity of products and market proximity. Proximity is critical: (a) in an Eveready format, given a strong mark’s “accessibility,” categorization involving an *internal search* of memory can occur where the respondent is likely to encounter the junior mark (and pattern match) in the natural flow of commerce; (b) in a Squirt format, however, where the senior mark is not “accessible” in memory, categorization involving the representativeness heuristic to aid inferences as to source can occur only if the marks exist side-by-side in the market, or if one is typically encountered so soon after the other that the recent brand or stimulus exposure (the “recency effect”) places both in the consumer’s “cognitive workspace.” A Squirt format, to iterate, is based on an *external review* of two stimuli that must be substantially proximate for the review, under “marketplace conditions,” to occur.

D. The Need for Control Cells

In the early days of Squirt designs, asking “Why do you say that?” questions and counting as confusion only trademark relevant responses was considered a solution to the suggestive

63. *Id.* at 450-51.

64. 839 F.2d 1183 (6th Cir. 1988) (quoting 3 *McCarthy*, *supra* note 3, § 23:3).

65. *Id.* at 1191. *But see* Vincent N. Palladino’s caveat in *Genericism Rationalized: Another View*, 90 TMR 469, 478-79 (2000):

. . . a party might argue that there is a likelihood of confusion between two marks because . . . the parties’ marks are similar and the goods are competitive. This conclusion might appear sound until one takes into account additional facts that bear on other factors identified in the Polaroid test, *e.g.*, the similarity of marks is due to incorporation of the same descriptive term, plaintiff’s mark already coexists with a host of similar marks, the goods are high priced items that sophisticated consumers spend much time buying, defendant chose its mark because of its relationship to the goods and not to trade on plaintiff’s good will, and there has been no evidence of actual confusion despite widespread sales of both parties’ goods for several years.

nature of the format.⁶⁶ If a respondent believes that two brands typically seen in the market together are “connected” and reaches that conclusion because “they are similar,” s/he is properly counted as supporting a likelihood of confusion conclusion because the representativeness heuristic is one means by which consumers draw “same company” inferences.⁶⁷

It may be, however, that a “same company” response is a pure guess, or “yea saying,” and that the “they are similar” explanation is a *post hoc* rationalization—that, faced with a question with demand effects, the respondent resorts to the representativeness heuristic after giving the “same company” answer rather than before. Alternatively, it may not always be obvious whether a “they are similar” response refers to the marks or to the underlying products.

On the reverse side of the coin, a dearth of “they are similar” responses to a “Why do you say that?” question may reflect the above footnoted inability of some respondents to access their “higher order processes.”⁶⁸ A “Why do you say that?” question is thus not a scientific control “so that causal inferences about the effect of a trademark [are] clear and unambiguous.”⁶⁹ It cannot serve as a proxy for an experimental design.

E. The Scope of Squirt

Historically, as noted above, Squirt studies have been rejected because they utilize closed-ended questions,⁷⁰ and opprobrium is likely to continue with respect to such questions that have a clearly “leading” effect,⁷¹ or to a Squirt test without a control cell. With, however, the advent of experimental designs, the judicial

66. See, e.g., *Star Markets, Ltd. v. Texaco, Inc.*, 950 F. Supp. 1030 (D. Haw. 1996).

67. See Gita V. Johar and Michel Tuan Pham, *Relatedness, Prominence, and Constructive Sponsor Identification*, 36 J. of Marketing Research 299 (1999), discussing the somewhat similar “relatedness” heuristic used in sponsorship identification.

68. See *supra* note 13.

69. Diamond, *Guide* at 257.

70. See *Riviana Foods Inc. v. Société des Produits Nestlé S.A.*, 33 U.S.P.Q.2d 1669, 1671 (S.D. Tex. 1994) (“Do you think the weight loss product ‘Sweet Success’ and ‘Success Rice’ are more likely made by the same company or more likely made by different companies?”).

71. See *Clicks Billiards Inc. v. Sixshooters Inc.*, 251 F.3d 1252, 1262-64 (9th Cir. 2001) (the question “Do you associate the visual look and appearance of this billiard parlor with Clicks Billiards or with other billiard parlors too?” resulted in 80 percent Clicks responses). In *Children’s Med. Ctr. of Dallas v. Columbia Hosp. at Med. Dallas Subsidiary L.P.*, 2006 U.S. Dist. LEXIS 9752 *20-23 (S.D. Tex. 2006), the court erred in holding that a blatantly leading question without a control (“If someone mentioned a Dallas hospital to you, and called it ‘Children’s,’ do you think ‘Children’s’ [a] Identifies *one specific* Dallas hospital [b] Or describes *more than one* Dallas hospital that provides pediatric services?”) went only to the weight of the study.

hostility toward closed-ended questions should abate.⁷² As noted above, such questions are often used as follow-ons to a “Who makes or puts this out?” question in Eveready designs, and closed-ended questions are typically used to test “comprehension” in surveys in false advertising cases.⁷³

More recently, in *National Distillers Products Co., LLC v. Refreshment Brands, Inc.*,⁷⁴ the court rejected a two-room Squirt study with respect to goods in the same category (vodka versus a vodka cooler) because, absent display of the senior mark in the first room, “respondents would have been unfamiliar with [the allegedly infringed product] due to [its] very limited distribution network and weak sales.”⁷⁵ That, however, is the reason for the existence of the format in the first place: without its insertion into consciousness, a weak mark cannot avail itself of consumer reaction evidence in a survey context.

Accordingly, many “closed-ended question” rejections and *National Distillers* are suspect law.⁷⁶ The true limit on the design should derive from how the representativeness heuristic operates in a Squirt format: it facilitates inferences based on the similarity between the marks *externally reviewed*. A Squirt format should thus not be used where tested brands do not proximately appear in the market. A weak mark should not be placed in “recent” memory/“cognitive workspace” if it would not appear there under normal market conditions. To do so might give a weak mark artificial “reach” that it does not intrinsically possess.

There are cases to the effect that brands should not be tested side-by-side in a Squirt format unless they appear so in

72. As anyone who has taken a Scholastic Aptitude Test appreciates, a closed-ended question is *not* intrinsically “leading.” Dr. Jacoby has offered me the following closed-ended, non-leading example: “Who among the following is currently a member of the United States Supreme Court: 1. Harriet Miers; 2. Thurgood Marshall; 3. Ruth Ginsberg; or 4. Karl Rove.”

73. See *Proctor & Gamble v. Hoffmann-La Roche*, 2006 WL 2588002 *22-25 (S.D.N.Y. 2006) (quoting *In re Stouffer Foods Corp.*, 118 F.T.C. 746, 806 (1994):

The open-ended format is well suited for surveys focusing on simple and/or primary claims made in ads. . . . “On the other hand, open-ended questions are likely to understate secondary claims, particularly where . . . those claims are rather complex by virtue of being both compound and comparative.”

As Dr. Jacoby notes, “Readily accessible stored information may be retrieved via open-ended (unaided recall) questions. However, retrieving less readily accessible stored information [as in a Squirt] generally requires using either ‘focused’ open-ended (aided recall) questions or closed-ended (recognition) questions.” Jacoby, *Psychological Foundations*, 91 TMR at 1016 n.8.

74. 198 F. Supp. 2d 474 (S.D.N.Y. 2002).

75. *Id.* at 482-84.

76. Because the study in *National Distillers* had other flaws (the universe included potential purchasers of the allegedly infringed, not infringing product), the rejection of the study was correct.

commerce,⁷⁷ and those cases are cognitively correct. There are cases to the effect that weak overlaps between brands do not support a Squirt approach,⁷⁸ and those cases are cognitively correct. The above-noted rationale that a two-room study “replicate[s] the marketplace process of [an] advertising exposure to a brand or trade dress, followed by being confronted in the market with both similar and differing brands or trade dresses” should be the subject of proof, not postulation (and it is difficult to envision what form such proof might take).

Even where marks substantially and demonstrably overlap, I am still concerned as to whether they will be *attended to*, given that “the vast majority of stimuli fail to register on consciousness”;⁷⁹ and given the elevated “confusion” levels that Squirt studies produce, I am further troubled by a design that often reflects control cell “noise” of more than 25 percent.⁸⁰ I nonetheless appreciate that for substantially overlapping marks, a Squirt format has significant scientific underpinnings.

IV. “GOING BOTH WAYS”⁸¹

The Eveready format tests market reality: “What would be the confusion level if we . . . allow introduction of the junior user’s

77. *Jordache Enters. v. Hogg Wyld, Ltd.*, 828 F.2d 1482, 1488 (10th Cir. 1987); *see also* *Leelanau Wine Cellars, Ltd. v. Black & Red, Inc.*, 452 F. Supp. 2d 772, 783-84 (W.D. Mich. 2006).

78. *See* *Kargo Global v. Advance Magazine*, 2007 U.S. Dist LEXIS 57320 at * 21-22:

Here, the back-to-back, or seriatim, display of the Cargo and Kargo marks did not approximate conditions that consumers would encounter in the marketplace. The products at issue (Kargo’s wireless services and Advance’s men’s shopping magazine, respectively) were not competing. Although some overlap existed in the demographic makeup of both Kargo’s and Cargo’s target audiences, the companies were engaged in different businesses. . . . Kargo has offered no data or other evidence to support the proposition that prospective customers were likely to encounter Kargo’s trademark a short time after seeing Cargo magazine.

See also *Simon Property Group L.P. v. mySimon, Inc.*, 104 F. Supp. 2d 1033, 1050 (S.D. Ind. 2000) (the plaintiff’s proposed survey “grossly distorts the ‘marketplace conditions’ in which Internet users might actually encounter the two parties marks together. . .”).

79. Jacoby, *Psychological Foundations*, 91 TMR at 1034; *see supra* note 20.

80. *See, e.g.,* *Pep Boys v. Goodyear*, 2002 U.S. Dist. LEXIS 5925 at *30 (32 percent of the consumers in the “control” group responded that they thought the Futura tire was . . . made by the same company, or affiliated or connected with the company that made the Portera tire shown in the first phase.”). I understand that there are subconscious and subliminal influences on memory, Hoyer and MacInnis, *supra* note 23, at 97-98, 433, and that elevated noise may be just a byproduct of general marketplace clutter. *See, e.g.,* Jacob Jacoby, Wayne D. Hoyer and David A. Sheluga, *Miscomprehension of Televised Communications* p8 (1980) (“the average amount of miscomprehension associated with any [televised] communication was an unexpectedly high 30%”). For me, however, “reliability” and elevated control cell noise are disconnects.

81. Dr. A. Simonson, *supra* note 8, at 2.

mark given the current level of awareness of the senior user's mark?"⁸² A Squirt design, on the other hand, by artificially affording the senior user's mark 100 percent top of mind awareness, permits the researcher "to isolate experimentally the effect of the similarities between the marks [and products—the brands—at issue]."⁸³ The benefits of both designs (an estimate of market reality and a pure estimate of brand similarity) can be achieved if, at the end of a Squirt questionnaire, respondents are asked "about prior awareness of the senior user's mark."⁸⁴ Given the level of judicial suspicion generated by variants of traditional designs, and the generally higher level of hostility to the Squirt format,⁸⁵ I doubt that "going both ways" will come into vogue. A dual approach, however, could afford benefits where the researcher does not know whether the senior brand is sufficiently available in consciousness so that the junior use will trigger pattern matching, or in the Circuits, like the Third, that emphasize mark similarity above other confusion factors.⁸⁶

V. CONCLUSION

Pattern matching and the representativeness heuristic suggest that for similar marks, particularly applied to similar goods, some level of confusion is likely—consumers draw inferences from a "fit" between stimuli. The Eveready format is ideal for testing whether, as to strong marks, the likelihood is appreciable, but the format should be confined in use to marks that are *accessible in memory* for comparison to a junior use that a respondent is likely to encounter in the market. It should not be deployed to "disprove" likelihood of confusion as to marks that are not internally accessible.

The Squirt format is the alternative for testing the likelihood of confusion between marks that are weak, but are simultaneously or sequentially *accessible in the marketplace* for comparison. It relies on the "proximity" factors (e.g., overlapping customers,

82. *Id.*

83. *Id.* (in an Eveready test, the degree of brand/product similarity is "confounded with levels of [brand] awareness").

84. The Eveready result from "going both ways" may be roughly derived from multiplying the Squirt result by the awareness percentage. *Id.* As, however, Dr. A. Simonson has indicated to the author, the extrapolation will not be exact: in the Squirt format, the senior mark is afforded top of mind awareness that may well exceed the lower level of awareness elicited by the back-end, aided recognition question. Email from Dr. A. Simonson, March 25, 2008, and related discussions.

85. See generally the author's chapter "Surveys in Trademark Cases in the United States" in R.M. Corbin and A.K. Gill (eds.), *Survey Evidence and the Law Worldwide* (2008).

86. See *supra* note 7.

channels of trade and advertising) in a likelihood of confusion analysis, rather than on the strength factor, as its market replication rationale. It will often be difficult (if not impossible) to ascertain sequential proximity with precision or to offer empirical evidence as to the level of actual market intersections among marks, and the format is similarly hypothetical in assuming that consumers will give marks the same attention in the marketplace as respondents give them in an interviewing booth. Experts should thus consider the testing of weak marks as a work still in progress. Within narrow limits, however, and with a robust control cell, a Squirt test from a cognitive standpoint is an arguably appropriate means for adducing survey evidence of likelihood of confusion in a weak mark case.

That leaves, of course, a question as to how likelihood of confusion should be tested when a weak mark does not appear in proximity to a similar junior one. I know of no realistic format for that purpose, and as may be gleaned from the foregoing, I deem it appropriate that none seems to exist. Compliant with a market replication mandate, there simply appears to be no way to test whether a weak mark will be confused with another's use in a commercial arena where the weak mark does not appear.
